No. 96-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS YANKTON SIOUX TRIBE AND DARRELL DRAPEAU'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE BOUNDARIES OF THE YANKTON SIOUX RESERVATION ESTABLISHED BY THE 1858 TREATY BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES REMAIN UNDIMINISHED.

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INTRODUCTION

Petitioner, State of South Dakota ("State"), has petitioned that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit entered in this matter on October 24, 1996. The Eighth Circuit affirmed the ruling of the federal district court, which ruling retained intact the boundaries of the Yankton Sioux Reservation as established in the 1858 Treaty between the Yankton Sioux Tribe and the United States.

Respondents Yankton Sioux Tribe and Darrell Drapeau respectfully request that the Court deny the State of South Dakota's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Procedural History.

The Yankton Sioux Tribe, *et al* ("Tribe"), brought an

injunction action in the United States District Court for the District of South Dakota, Southern Division, against the Southern Missouri Waste Management District ("District"), seeking to enjoin the planned construction of a landfill on privately owned land located within the boundaries of the Yankton Sioux Reservation ("Reservation"). By agreement with the State, the District brought in the State as a third party defendant, enabling the State to challenge the existence of the Reservation's boundaries.

Following a five day trial, the district court ruled that the boundaries of the Reservation were undiminished, pursuant to the 1858 Treaty between the Tribe and the United States, 11 Stat. 743. The district court ruled that the terms of an 1892 surplus land sales agreement between the Tribe and the United States government, ratified by Congress in 1894, 28 Stat. 286, did not evince an intent by Congress to diminish, or to disestablish, the Reservation. *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 890 F.Supp. 878 (D.S.D. 1995) reproduced in State's Appendix ("State's App.") 66, 89. Immediately following the trial, the district court granted the State's request for a stay of execution of its ruling. The stay was later revoked on the Tribe's motion due to an unstable law enforcement situation on the Reservation which resulted from the stay. The State applied for a stay directly to the court of appeals, which was denied.

The State then appealed the district court's ruling on the merits to the Court of Appeals for the Eighth Circuit. The Eighth Circuit, in a two to one decision, affirmed the trial court. *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 99 F.3d 1439 (8th Cir. 1996) reproduced in State's App. 1. The Eighth Circuit then denied the State's request for rehearing, as well its suggestion for a rehearing *en banc.* State's App. 98.

The decision of the trial court, as well as the affirmation

by the Eighth Circuit, centered on the savings clause in Article XVIII of the 1894 statute, ratifying the 1892 surplus land sales agreement. *Agreement with the Yankton Sioux or Dakota Indians, in South Dakota*, 1892, ratified, 28 Stat. 286 (1894) reprinted in State's App. 111. Both the district court and the court of appeals ruled that Congress intended that the Reservation boundaries established by the 1858 Treaty were maintained intact by the language of the savings clause. State's App. 27-29, 34, 82-84. *Treaty with the Yankton Sioux*, 1858, ratified 11 Stat. 743 (1859), reprinted in State's App. 99.

As a basis for its application for a Writ of Certiorari, the State relies heavily upon the conflict set up by a recent South Dakota Supreme Court decision. That decision repudiates the Eighth Circuit's finding that the Reservation's boundaries remain undiminished. *See State v.Greger,* 1997 S.D. 14 (1997) reprinted at State's App. 125. Further, the State relies on what it terms, "cession and sum certain" language in the 1894 Act that creates, in its words, "an almost insurmountable presumption" of diminishment. The State also relies on dicta by this Court in a 1914 case, *Perrin v. U.S.*, 232 U.S. 478 (1914), in which Justice Vandevanter made casual mention of, " . . . lands formerly included in the Yankton Sioux Reservation . . . ." The State has parlayed this brief mention into what it views as a holding of diminishment by this Court. The State glosses over the fact that in *Perrin,* the Court's decision did not investigate, analyze, or even consider the question of diminishment.

B. Historical Background.

In 1858, the Yankton Sioux Tribe occupied in excess of 13 million acres of land in what is now the Dakotas, Nebraska, and Minnesota. At that time, the United States government negotiated a purchase of some 11 million acres from the Tribe.

The purchase and sale of the land was set out in the Treaty of 1858, 11 Stat. 743, between the Tribe and the government. The Treaty guaranteed the Tribe peaceable possession of a newly created reservation of some 400,000 acres located in what is now southern Charles Mix County, South Dakota, along the eastern bank of the Missouri River. The Treaty laid out a precise metes and bounds description of the boundaries of the new Reservation. 11 Stat. 743. A later survey indicated that, in reality, the Reservation described in the Treaty comprised a total of 430,195 acres. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 5 (1894) (hereafter S.Doc. 27).

After passage of the General Allotment Act (Dawes Act) in 1887, 24 Stat. 388, codified at 18 U.S.C. § 331 *et. seq.* the United States government forced upon the Tribe (as it did on other tribes) the policy of allotting collectively owned Tribal lands to individual Tribal members. When the United States completed the allotment of acreages to Tribal members, there remained unallotted approximately 200,000 acres of "surplus lands." S. Doc. 27 at 5; *Yankton Sioux Tribe v. United States,* 224 Cl. Ct. 62, 623 F.2d 159 (1980).

By 1892, in response to pressure from non-Indian settlers to open the newly allotted Reservation to settlement, the United States sent a team of three Commissioners to the Yankton Sioux Reservation to begin negotiations with the Tribe for the sale of these surplus lands. S.Doc. 27 at 7-8.

Following lengthy negotiations with Tribal leaders, amid allegations of outright bribery of Yankton Sioux Tribal members by the Commissioners in order to obtain Tribal approval for the sale, and in addition, to pressure to sell upon members of the Tribe by religious missionaries, a sale agreement was signed in 1892 between the Tribe and the United States. *Id.* at 35, 83-84, 95. The agreement was ratified by Congress in 1894. 28 Stat. 286 (1894).

During the negotiations there was debate about the best

way to handle the purchase of the surplus lands. The Tribe wanted an "appraisal and sale" method, whereby each parcel would be appraised and sold separately to the highest bidder. The government ultimately believed not only that this method would be cumbersome and that some of the less desirable parcels would remain unsold, but that another commission would have to return later to negotiate for the sale of the unsold parcels. *Id.* at 12. The parties ultimately agreed upon the government's outright purchase of the surplus lands at a fixed price per acre--for a total of $600,000. *Id.* at 13-14. The 1894 statute, 28 Stat. 286, included Article XVIII, a savings clause vastly different from any other in all the surplus land Acts drafted by the United States government. At the conclusion of the trial of this action in 1995, the district court requested briefs from all the parties to assist the Court in determining whether savings clauses in other surplus land sales Acts contained language as definite and as strong as that of Article XVIII. *Yankton Sioux Tribe,* 890 F.Supp. at 885, App. 81. None of the parties could find similar language in any other surplus land sales Acts.

Article XVIII states as follows:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19, 1858, between the Yankton Tribe of Sioux Indians and the United States. And after the signing of this agreement and its ratification by Congress, all provisions of said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19, 1858.

28 Stat. 286. Both the district court and the court of appeals in this case viewed Article XVIII as the anchor which held fast the boundaries of the Yankton Sioux Reservation, and which distinguished the Yankton surplus land sales act from other Acts

in which this Court, in past cases, has determined the boundaries to be diminished. Not only was there no limiting language in the clause, but the clause twice mandated that the 1858 Treaty should remain intact. The Tribe's expert witness, Professor Herbert Hoover, a professor of history at the University of South Dakota, and a specialist in Yankton Sioux Tribal history, testified at trial that the portion of Article XVIII relating to annuities had its genesis in a fear by Tribal leaders that the government would cut off their annuities as punishment for any perceived sins of the Tribe, much as the government did to one of the Minnesota Sioux Tribes in prior years. Trial Transcript ("T") at 62-70.

After close examination of the statute's language as a whole, and of the extensive legislative history and events near the time of passage, a majority of the court of appeals determined that Article XVIII indicated Congress's intent to retain the boundaries intact. *Yankton Sioux Tribe,* 99 F.3d at 1453-54, State's App.31-33. Neither in the record of the negotiations, nor in the legislative history does there appear any manifestation of Congressional intent to diminish or to disestablish the Reservation boundaries. *Id.*

The Treaty executed by the Tribe and the United States in 1858, did, in fact, diminish the Yankton Sioux Reservation from 13 million acres down to some 400,000 acres. However, the new boundaries were clearly set out in that Treaty, which described in metes and bounds the new boundaries of the newly diminished reservation of 430,195 acres. *See* 11 Stat. 743. In contrast, the 1894 statute contains neither an indication of any new reservation boundaries, nor any diminishment of the 1858 boundaries. 28 Stat. 286.

C. Corrections of Misstatements in the Petition

In its Petition, the State selectively describes the

legislative history and historical events presented to the federal courts. Space does not allow Respondents to correct every misrepresentation of the historical record made by the State. The Tribe invites the Court's attention to the opinions of the district court and the court of appeals in this action, and to the actual documents contained in the parties' appendices in order to determine the accurate legislative history and historical events relevant to this action. Much of the legislative history referred to by the parties and by the lower courts is contained in Senate Document No. 27, which appears in the record of the trial. The opinions, both of the trial court and of the Eighth Circuit, provide a complete analysis of the legislative history, as well as evidence of historical events presented by the parties.

The State further makes misstatements in its assertion that other land sales agreements between Indian tribes and the government are "equally strong" as that between the Yankton Sioux Tribe and the government. State's Petition at 8-9, 19-20. The parties provided the district court with separate briefs on this issue alone, and neither the State nor the Tribe were able to find any surplus land sales agreement that contained similar language, or that contained language as strong, or with as much force as the savings clause at issue here. *Yankton Sioux Tribe,* State's App. 16-17.

The Tribe also objects to the map referred to in the State's brief and located at State's App. 159, as being new material inserted by the State, not included in the record at trial, which the State admits. *See* State's Petition at 7, n.8. Respondents respectfully request that the map not be considered by this Court.

Finally, the Tribe takes issue with the States' misreading of the court of appeals decision, in which it stated that the court "recognized [that] its decisions put the court of appeals in conflict with prior decisions of the South Dakota Supreme Court." State's Petition at 12. In actuality, the court of appeals

found that the issue of whether the Yankton Reservation was diminished or disestablished had never been squarely litigated and decided either in federal court or in state court in such a manner that would provide full development of the issues, or a full analysis required by the United States Supreme Court. The court distinguished the prior federal and state decisions cited by the State. *Yankton Sioux Tribe,* 99 F.3d at 1451, n. 18-19 (citations omitted), State's App. at 25-26.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS NOT APPROPRIATE IN THIS CASE BECAUSE THE STATE ALLEGES ERRONEOUS FACTUAL FINDINGS AND THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

As a basis for its application for writ of certiorari, the State claims that the court of appeals erred in failing to follow the Court's analytical structure of *Hagen v. Utah,* 510 U.S. 399 (1994) and other precedents. State's Petition at 15. However, a reading of the Eighth Circuit's carefully thought out opinion belies this allegation. The Eighth Circuit faithfully followed this Court's canons of construction and its analytical structure as set out in *Hagen.* The State's argument is nothing more than a disagreement with the court of appeals' interpretation of the 1894 statute, which, under Supreme Court Rule 10, is not to be considered, and is inappropriate as a ground for granting an application for a writ of certiorari.

Moreover, a writ of certiorari is not appropriate when the alleged error consists of erroneous factual findings. *See* Supreme Court Rule 10. The determination of whether

language in surplus land sales agreements either diminishes or retains a reservation's boundary is totally fact driven. Applying the *Hagen* principles to the language existing in a variety of different savings clauses will inevitably result in a different outcome for each case. The State's allegation that the court of appeals' opinion conflicts with this Court's precedent is pure and simple a disagreement with the court of appeal's factual findings and with its application of the proper rules of law under *Hagen. See* State's Petition at 15-23. The State asserts in its Petition that the court of appeals erroneously applied the evidence, including the language of the 1894 Act, the legislative history, and historical record specific to this case. *Id.* The State argues that the language of the 1894 Yankton Act and the historical record should be interpreted to mean that diminishment was accomplished by the Act. *Id.* Further, the State argues that the factual findings relative to the jurisdictional history of the reservation and the application of these facts were in error. *Id.* at 24-26. The State is arguing that the court of appeals made erroneous factual findings and that it misapplied the law. *Id.* at 15-28. The State's Petition for Writ of Certiorari is inappropriate and should be denied.

II.

GRANTING OF CERTIORARI WILL ENCOURAGE STATE COURTS TO IGNORE PRINCIPLES OF COMITY AND IGNORE FEDERAL DECISIONS INTERPRETING ISSUES OF FEDERAL LAW.

The State asserts that this Court should grant the Writ of Certiorari due to the conflict resulting from the recent South Dakota Supreme Court's decision in *State v. Greger*, 1997 S.D. 14 (1997). However, it is important to note that the Tribe was not a party to any level of the *State v. Greger* court proceedings.

The State seeks to use Fred Greger's criminal offense in an opportunistic manner to persuade this Court to re-decide an issue that has already been decided by two levels of federal courts. The State seeks a second bite of the apple simply because it does not like the outcome of the federal decisions. By strategically and intentionally seeking a ruling in the State court on a federal issue so as to create a conflict between the state and federal courts, the state seeks to persuade this Court to review an issue that has been extensively reviewed and decided. Granting certiorari in this case will give the state exactly what its strategy seeks: a second chance at this issue, despite the inappropriateness of the state court's decision which refuses to defer to the federal courts on this issue of exclusive federal law.

As well, the decision in *Greger* completely ignores Article VI of the United States Constitution, which provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Supremacy clause, along with Article I, §8 of the United States Constitution, giving Congress plenary power over Indian tribes, makes clear that the federal government is supreme in dealing with Indian tribes. *See Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832). As an aspect of Indian tribes' inherent sovereignty and grant of authority to the United States government, state interference with Indian tribes is generally prohibited except to the extent Congress has granted the state authority. *See id.* at 561-62. This policy of "leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164, 168 (1973). The State of South Dakota

recognized this policy as a condition in the South Dakota Constitution and in its Enabling Act. *See South Dakota Constitution,* Art. XXVI, §18; *South Dakota Enabling Act* §10, 25 Stat. 676 (February 22, 1889), reprinted in App. 1.

In its decision in *State v. Greger*, the South Dakota Supreme Court completely ignores its own previous ruling in *St. Cloud v. Leapley,* 521 N.W.2d 118, at 122 (S.D. 1994), which holds:

> However, "with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes." (citations omitted).

Additionally, in *St. Cloud,* the South Dakota Supreme Court cited the holding of *Ex Parte Gurganus,* 603 So.2d 903, 906 (Ala.1992), in which the Alabama Supreme Court stated:

> Federal decisional law interpreting a federal statute ... and delineating the rights and obligations thereunder is binding on this Court under the Supremacy Clause of Article VI of the United States Constitution . . . .

The South Dakota Supreme Court has failed to follow its own policy of deferring to federal courts on matters of federal law. The South Dakota Supreme Court has recognized that "federal courts are the ultimate decision maker as to whether federal, state or tribal courts have jurisdiction in a particular Indian law case." *State v. Daly,* 454 N.W.2d 342, 344 (S.D. 1990). The South Dakota Supreme Court has even overruled its own ruling in recognition of the federal court of appeal's ruling concerning state jurisdiction over Indians. *See State v. Spotted Horse,* 462 N.W.2d 463, 467 (S.D. 1990), cert. denied, 500 U.S. 928 (1991). The South Dakota Supreme Court ignored its own well established precedent for deferring to federal decisions in matters of Indian law. In this case federal statutory provisions are at issue, as well as the federal supremacy clause. Given the federal trust relationship assumed by the federal government

toward Indian tribes, and the fact that federal courts decided this issue of exclusive federal law prior to the decision by the State Supreme Court, the state court was obligated to defer to the federal interpretation of this issue.

It is important to realize that, although the State alleges that the South Dakota Supreme Court has previously determined that the Yankton Sioux Reservation was diminished by the 1894 Act, prior to *Greger,* the issues regarding diminishment were never fully presented to the court. The court, in previous cases, did not address the legislative history and surrounding circumstances of the Act or the savings clause contained in Article XVIII, but relied almost exclusively on the language of Articles I and II. *See State v. Thompson,* 335 N.W.2d 349 (S.D. 1984); *Wood v. Jameson,* 130 N.W.2d 95 (S.D. 1964). In addition, the Tribe has never been a party to any case before the state court which has squarely considered the issue of diminishment in light of Article XVIII.

The Eighth Circuit recognized that the South Dakota Supreme Court had never fully decided the issue of diminishment, and had never before considered the savings clause or the legislative history. *Yankton Sioux Tribe,* 99 F.3d at 1451 n.19, State's App. 26. The court of appeals further recognized that other cases relied upon by the State did not decide the issues of diminishment. *Id.* at n.19. *See Yankton Sioux Tribe v. United States,* 623 F.2d 159 (Cl. Ct. 1980) (focus of case was fair market value of unallotted land sold by tribe, comments relating to diminishment were dicta); *Weddell v. Meierhenry,* 636 F.2d 211 (8th Cir. 1980), cert. denied (1981) (habeas relief requested, diminishment not litigated or raised by the parties). Granting certiorari in this case, will, in effect, encourage the state court to ignore the doctrine of comity in the future as well. Comity concerns are heightened where, as here, the South Dakota Supreme Court is asked by the State to revisit already decided issues of federal law for the sole purpose of

creating a conflict with the federal courts.

As well, granting certiorari in this case inevitably will encourage forum shopping. It will also encourage litigating parties to persuade a state's highest court to review issues previously decided in federal courts in order to set up such a conflict, needlessly upsetting previously settled areas of law, and achieving jurisdictional clash. Therefore, the State's Petition should be denied.

III.

THE STATE'S ARGUMENTS DO NOT SUPPORT THIS COURT'S GRANTING OF A WRIT OF CERTIORARI.

The State relies heavily upon three arguments to buttress its case in favor of granting certiorari in this matter: (1) the opinion of the Eighth Circuit Court of Appeals conflicts with this Court's diminishment jurisprudence; (2) a conflict was set up by the recent decision of the South Dakota Supreme Court; and (3) this case raises issues of national importance. None of these arguments support this Court's granting of a writ of certiorari in this case.

A. The court of appeals decision does not conflict with this court's rulings on diminishment.

This Court, in *Hagen v. Utah,* 114 S.Ct. 958 (1994), articulated its most current standard for deciding whether or not surplus land sales acts have diminished or disestablished reservation boundaries. This Court stated:

> The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage. In determining whether a reservation has been diminished, [o]ur precedents in

the area have established a fairly clean analytical structure, directing us to look to three factors. The most probative of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, on a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment. Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. (Citations omitted). *Hagen* 114 S.Ct. at 965-966.

In reaching its decision that the Tribe's boundaries were not diminished or disestablished, the court of appeals faithfully followed this Court's canons of construction.

First of all, understanding that the language of the statute is the "most probative" factor in determining Congressional intent, the court of appeals analyzed in detail the pertinent sections of the 1894 statute effectuating the agreement as a whole. The majority compared savings clauses in other surplus land acts and found that each contained limiting words which completely distinguish all other savings clauses from the Yankton Sioux agreement. *Yankton Sioux Tribe*, 99 F.3d at 1447. For example, some of the clauses spoke of treaty provisions "not inconsistent" with the other provisions of the agreement in question and are distinguishable. *See e.g., Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S.

753, 760-61 (1985) ("nothing in this agreement shall be construed to deprive [the tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 623 (1977) (benefits of existing treaties and agreements continue unless "inconsistent with the provisions of this agreement"); *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162 (1971) (all treaty provisions "not altered by this agreement are hereby continued in full force and effect"); *Dick v. United States*, 208 U.S. 340, 352 (1908) (treaty provisions "not inconsistent with the provisions of this agreement are hereby continued in full force and effect").

Article XVIII in the Yankton Sioux agreement contains no such limiting language. In the court of appeals' analysis, reading Article XVIII together with Articles I & II, the savings clause gives all of the parts of the agreement both consistency and force, stating that the unusually expansive language of Article XVIII "suggests that other sections should be read narrowly to minimize any conflict with the 1858 Treaty." *Yankton Sioux Tribe*, 99 F.3d at 1447.

The State, asserting a conflict with the 1858 Treaty, argues for a literal reading of Article XVIII, which, if read literally, would prevent the Tribe from selling any of the land to the government or to anyone else. However, acceding to the State's theory would have also prevented the State from exercising jurisdiction over parts of the Reservation, as it boasts of having done ever since 1894. The State's exercise of jurisdiction over parts of the Reservation has been patently illegal from its inception, primarily because of South Dakota's Enabling Act §10, 25 Stat. 676 (February 22, 1889), reprinted in App. 1 and because of South Dakota's Constitution, S.D. Const. Art. XXVI, §18, reprinted in App. 1 each of which forever foreswore any claim of jurisdiction over Indian lands.

In response to the State's argument that Article XVIII relates only to the continuation of annuities, the majority of the court of appeals panel understood that Congress knew how to limit the reach of the annuities provision based on previous Congressional actions, but it did not limit such reach, leading to the conclusion that the Article covers much more than annuities. *Yankton Sioux Tribe*. 99 F.3d at 1448, State's App. 18-19.

Moreover, beyond its clear holding that Congress intended no diminishment in this case, the court of appeals majority concluded that, if an ambiguity exists in the language of the 1894 statute, then, according to this Court's direction in *Hagen*, any such ambiguity must be resolved in favor of the Indians. *Id.* at 1449, State's App. 19. *See Hagen*, 510 U.S. at 410-11.

However, what is really at issue here, despite the State's rambling effort to create a distinction between this Court's rulings of law and that of the court of appeals, is simply a factual interpretation by the federal courts that the State does not like. In asking this Court to resolve a factual dispute, the State goes far beyond any rationale for the granting of a Writ of Certiorari. *See Supreme Court Rule 10.* The State is, in essence, arguing that the court of appeals erred in its factual findings and misapplied the Court's canons of construction and precedent. These arguments are not appropriate for this Court's review. *Id.*

B. "Cession and sum certain" Language In The Agreement Is Not Dispositive.

The key question identified by the Eighth Circuit in its interpretation of the 1894 statute is, "whether Congress intended that the tribe's governmental authority be transferred with the land sale." This is, in reality, the heart of the diminishment or

non-diminishment question.

The State's heavy reliance on cession and sum certain language becomes misplaced when one considers this Court's holdings with respect to the probative value of a surplus land statute. Under this Court's canons of construction, if there is no clear direction concerning congressional intent from any part of the statute, the Courts then are directed to use a juridical ouija board to plumb the intent of Congress. If there is no savings clause, as there is in the Yankton Agreement, then other language, such as cession and sum certain, would come under consideration. However, where there is strong language present in the statute clearly indicating congressional intent, as there is in Article XVIII, and especially where it is read together with Articles I & II, the ouija board becomes totally unnecessary. There is no need for the courts to play the conjecture game by turning to the vagueness of cession and sum certain language.

Secondly, this Court's inquiry into the questions of *de facto* changes in demography of the Reservation diminishes in importance when there exists a clear intent by Congress to preserve the Reservation's boundaries, as Article XVIII does in this case. Even without the savings clause, the fact that non-Indian settlers purchase surplus lands should be of minimal shock value, especially when one considers that the sole purpose of the sale and purchase of surplus lands was to bring non-Indian settlers into the reservation. The government believed that the allotment policy would benefit the Indians by forcing individual ownership, by enforcing individual responsibility, by requiring the Indians to abandon communal notions of property and social organization, and encouraging them to learn the techniques of productive farming from their new non-Indian neighbors. *Hagen*, 510 at 402-04. *See also* S. Doc. 27.

As the federal courts point out, the State's reliance on the fact that it began exercising jurisdiction over these areas as

early as 1895 is not dispositive and does not confirm the appropriateness or the legality of the exercise of state jurisdiction, nor is it inconsistent with the existence of shared jurisdiction by Tribal, state, and federal governments. *Yankton Sioux Tribe,* 99 F.3d at 1453; 890 F.Supp. at 887, State's App. 33, 87. The federal courts here recognized that the evidence was simply inconclusive and did not support *de facto* diminishment. *Id.*

C. Liquor Provisions and Common School Language Do Not Indicate An Intent to Diminish.

The contemporary discussion on the statute by the Commissioners indicates that the Tribal leaders wanted to make certain that, if the surplus lands were sold, liquor would not be brought into the reservation by virtue of opening it up to white settlement. In the words of the government's Commissioners:

> . . . It is certainly to the credit of these people that they demand that this condition [Article XVII] should be put into the agreement, and we hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants ***within the limits of the reservation.*** (Emphasis added). S. Doc. 27 at *21.*

The court of appeals concluded that the liquor provision was not inconsistent with the intent to preserve the 1858 boundaries. The court found this case distinguishable from *Rosebud,* 430 U.S. at 613 in which the court found the liquor clause gave rise to an inference of diminishment. *Yankton Sioux Tribe,* 99 F.2d at 1449-50; State's App. 23-25. In this case, the court found that the language was not surplusage as in *Rosebud,* because the negotiations between the Yankton Sioux Tribe and the government were conducted shortly after the 1892 liquor act, and there was no evidence that either party was aware

of it at the time the 1892 Agreement was negotiated. Further, the liquor statute would have ceased to apply if the Reservation were eliminated in the future, but the liquor provision the Tribe insisted on in the agreement would remain. Therefore, the court of appeals correctly found that the liquor provision did not demonstrate an intent to diminish. *Id.*

The State similarly attempts to apply the rationale of *Rosebud* to this case, alleging that the language of the 1892 Yankton Agreement reserving land for common school purposes indicated an intent to diminish the Reservation. Congress added a provision to the 1892 Yankton Agreement that "the sixteenth and thirty-sixth section in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." However, as the court of appeals recognized, *Rosebud* does not have force in this case because the 1894 Act makes the common school sections subject to state law and if Congress intended to diminish the Reservation, the common school sections would have been subject to the laws of the state in any event, and the grant of jurisdiction to the State of South Dakota would have been unnecessary. *Id.* at 1450. The court of appeals determined that the common school language was consistent with the conclusion that Congress desired to ensure that the "infrastructure would exist for common schools for all future residents into the assimilated area." *Id.* The State's reliance on these provisions is misplaced as they do not, in the Eighth Circuit's analysis, demonstrate an intent to diminish the Yankton Sioux Reservation.

IV.

THE COURT SHOULD DENY THE WRIT OF CERTIORARI BECAUSE THE STATE IS BARRED FROM RELITIGATING THE BOUNDARY ISSUE AND

BECAUSE THE TRIBE WAS NOT A PARTY AT THE STATE PROCEEDING.

A. The State is barred from relitigating the boundary issue under the doctrine of collateral estoppel.

The doctrine of collateral estoppel does not bar a cause of action, but it bars relitigation of an essential fact or issue involved in an earlier suit from a court of competent jurisdiction. As this Court has explained:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privities . . . ." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49, [18 S.Ct. 18, 27, 42 L.Ed. 355] (1897).

Montana v. United States, 440 U.S. 147, 153 (1979). Under collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation . . . ." *Id.* (citations omitted). The Court elaborates on the policy underlying this doctrine:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana, 440 U.S. at 153-54 (footnote omitted). This Court has further explained:

> Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (citations omitted). *See also Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 328-29 (1971).

Federal courts apply a four-part test to determine whether collateral estoppel applies: (1) was the issue decided in a prior adjudication identical with the one presented in the action in question; (2) was there a final judgment on the merits; (3) was the party against whom the plea was asserted a party or in privity with a party to the prior adjudication; and (4) did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication. *Montana,* 440 U.S. at 1147-53; *Oldham v. Pritchett,* 599 F.2d 274 (8th Cir. 1979).

In this case, the issue of whether the boundaries of the Yankton Sioux Reservation remain intact was clearly the identical issue decided by the federal courts but redecided by the state court in *State v. Greger.* There was a final judgment on the merits in both federal actions. The State has never claimed that it did not have a full and fair opportunity to litigate the boundary issue at any proceeding, and given the voluminous record, the State cannot make such a claim. Thus, the requirements for the invocation of the doctrine of collateral estoppel are all present, and the state should be barred from attempting to relitigate the issue of the Yankton Sioux Reservation boundaries.

The fact that the Tribe was not a party to the state court *State v. Greger* action does not preclude the use of collateral estoppel. This Court has recognized that nonmutual offensive collateral estoppel can be used so that a nonparty to a prior

action can use collateral estoppel in a later action against a party to the prior action. *See Parklane Hosiery,* 439 U.S. 322 (1979). In *United States v. Mendoza,* 464 U.S. 154, 162 (1984) the Court limited the use of collateral estoppel against the United States Government.

There are very few cases that apply *Mendoza* to prohibit the use of collateral estoppel against a state government. In fact, the Eleventh Circuit is the only federal decision to apply the decision to prevent collateral estoppel against a state government, *Hercules Carriers, Inc. v. Claimant State of Florida,* 768 F.2d 1558 (1985), and other circuit courts have failed to follow this decision. *See e.g., Benjamin v. Coughlin,* 708 F.Supp. 570 (S.D.N.Y. 1989), aff'd 905 F.2d 571 (2nd Cir. 1990).

Mendoza involved allegations of a violation of the United States Constitution. The Court expressed the policy that the rule should apply only against the United States Government on issues that involve public issues affecting citizens throughout the land. The Court said the proscriptions of the United States Constitution are generally directed against the government and often arise in a case in which the government is a party. Thus, the Court explained, the government is more likely than a private party to be involved in lawsuits against different parties involving the same issue, and a rule allowing collateral estoppel against the government would thwart the development of important legal questions. *Id.* at 160.

Such policy considerations do not apply in this case. Here, the issue arises in a fact-specific dispute involving specific federal statutes geared to one site only, including federal conduct applied to a remote and relatively isolated area in South Dakota. Collateral estoppel is available against the State of South Dakota in this case, unlike in *Mendoza* in which the Court limited its ruling to the "issues such as those involved in this case." *Mendoza,* 464 U.S. at 162.

None of the exceptions to the rule of collateral estoppel

are available in this case. The two most important exceptions are whether the controlling facts have changed significantly since the first judgment, and whether the controlling legal principles have changed significantly since the first judgment. *Montana,* 440 U.S. at 155. The facts necessary to decide the boundary issue have remained the same throughout the federal actions and the state court action. The opinions reveal that the courts considered virtually the same evidence. The same controlling legal principles are applied by both the state court and the federal courts. No new authority has since emerged.

The doctrine of collateral estoppel is no less meaningful in the context of a case involving the diminishment of an Indian reservation, and in fact has been applied in cases involving this issue. *See White Earth Band of Chippewa Indians v. Alexander,* 683 F.2d 1129 (8th Cir. 1982), cert. denied sub. nom. *Counties of Mahnomen and Clearwater, Minnesota v. White Earth Band of Chippewa Indians and Alexander,* 459 U.S. 1070 (1982).

The State's allegations of the boundary issue as one of substantial public importance is not enough to give the State carte blanche to disregard another court's judgment altogether so that it may relitigate the same issue in another forum. The State should be barred from again seeking review of the boundary issue. *See also* Restatement (Second) of Judgments § 28, comment b (1982) (it is not necessary to determine whether the issue is one of fact or law for issue preclusion, it is an unnecessary burden on the courts to allow repeated litigation of the same issue).

This is the first opportunity for the Tribe to assert collateral estoppel against the State. The Tribe was not a party to the proceedings in *State v. Greger* at any stage and could not have pressed the issue below. This Court's review of the boundary issue in this case would give credibility to the state court decision which has exceeded its authority by ignoring the supremacy clause, and by refusing to defer to the federal courts

on this exclusive issue of federal law. Review of this case would send a message to state courts that they are free to re-decide federal issues whenever they do not like the outcome decided by the federal courts. The State should be estopped from seeking yet another review of the boundary issue in this case.

B. The Tribe Is Not Bound By The State Supreme Court Decision Because It Was Not A Party To The Proceedings.

This Court has ruled that a sovereign is not bound by a decision purporting to resolve a boundary dispute affecting that sovereign when the sovereign was not a party to the proceedings. *Georgia v. South Carolina,* 497 U.S. 376 (1990). Thus, the Tribe, which was never a party to the proceedings in *State v. Greger*, is not bound by the South Dakota Supreme Court's interpretation of the issue, and in effect, there really is no conflict. The State, on the other hand, was a party to the proceedings in the federal court actions and should be bound by the federal decisions in this case.

Although the State may argue that this Court has decided cases involving the boundaries of an Indian reservation in cases in which the tribe was not a party, none of these cases involved relitigation of a reservation boundary issue directly involving the affected tribal, state, and local governments as parties. *See e.g., Solem,* 464 U.S. 463; *DeCoteau,* 420 U.S. 425; *Mattz v. Arnett,* 412 U.S. 481 (1973).

It is inequitable to hold a party bound by a decision in which it was not even a party, and had no opportunity to be heard before the court, especially in view of the fact that the same party in this case, the State, had litigated precisely the same issue in a different forum and is now seeking relitigation of the issue because it did not like the outcome in the federal system. This forum shopping should be discouraged.

CONCLUSION

For the reasons discussed above, the Tribe respectfully requests that this Court deny the State's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDICES

THE ENABLING ACT

(Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676.)

§10. That upon the admission of each of said states into the union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any action of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the Legislature may provide, with approval of the secretary of the interior; provided, that the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grant nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character, be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

CONSTITUTION OF SOUTH DAKOTA

(Adopted October 1, 1889; yeas, 70,131; nays, 3,267.)

§ 18. **Freedom of religion -- Public lands -- Indian lands -- Uniformity of taxation -- Territorial debt -- Public schools -- Federal reservations -- Irrevocability.**

That we, the people of the state of South Dakota do ordain:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of South Dakota, do agree and declare, that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries of South

Dakota; and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state, shall never be taxed at a higher rate than the lands belonging to residents of this state. That no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been, or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, all such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.

Fifth. That jurisdiction is ceded to the United States over the military reservations of Fort Meade, Fort Randall and Fort Sully, heretofore declared by the president of the United States: provided legal process, civil and criminal, of this state shall extend over such reservations, in all cases of which exclusive jurisdiction is not vested in the United States, or of crimes not committed within the limits of such reservations.

These ordinances shall be irrevocable without the consent of the United States, and also the people of the said state of South Dakota, expressed by their legislative assembly.